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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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MAR 29 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Tariff Filing Requirements for)
Nondominant Common Carriers)
_____)

CC Docket No. 93-36 /

COMMENTS OF SPRINT

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March 29, 1993

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SUMMARY

In this proceeding the Commission is looking toward codifying the parameters for the tariff filing of nondominant carriers in the wake of the D.C. Circuit's decision in AT&T v. FCC. Sprint is a nondominant carrier which, despite the Commission's permissive detariffing policy, has continued to provide its services pursuant to tariff. Based on its experience, Sprint supports the Commission's decision to formalize its existing policies of allowing nondominant carriers to state their tariffed rates as either maximum rates or "rate ranges."

Such decision is properly grounded upon the Commission's discretion under Section 203(b)(2) of the Act to modify any of the requirements of Section 203, including the form of and information contained in tariffs, "upon good cause shown." Plainly, the Commission's action here comes within such modification authority. While such action codifies a relaxation of the specific information to be included in the tariffs of nondominant carriers, it does not in any way eliminate the requirement under Section 203(a) of the Act that each carrier file schedules of charges with the Commission.

There is also good cause for the Commission to apply its modification power to formally limit the amount of information which a nondominant carrier must include its schedules filed with the Commission. The imposition of the same tariff content requirements upon the now 400 plus nondominant carriers as are

required of dominant carriers would be largely unworkable. Moreover, the continuation of the Commission's existing practice of allowing nondominant carriers to file maximum rates or rate ranges would advance the public interest goal set forth in Competitive Carrier. It would continue the regulatory system under which nondominant carriers would be able to meet the tariffing requirements of Section 203 and still be able to engage in vigorous price competition to provide for service innovation to easily enter the market and to respond quickly to market trends.

Also, the tariff content requirements imposed upon dominant carrier are simply not necessary for nondominant carriers. This is so because under well-established economic principles carriers without market power cannot successfully charge excessive rates, engage in unlawful discrimination or otherwise violate the Act.

Although Sprint agrees that the submission of tariffs on diskettes as proposed by the would be beneficial, it believes that nondominant carriers should be allowed the alternative to continue to file their tariffs under the existing format. Sprint already has extensive tariffs on file with the Commission and it would be extremely burdensome for Sprint to modify those tariffs to conform to the new format.

Finally, Sprint does not believe it necessary to reduce the current 14-day notice period for nondominant carriers to one day. Sprint has not found the 14-day notice period to be burdensome or an impediment to its ability to compete in the marketplace.

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rules to certain classes of nondominant carriers.¹ Although the Court "had no quarrel with" the objectives which the Commission's permissive detariffing policy are designed to achieve, it found that under Section 203 of the Act the Commission lacked the authority to adopt such a policy (AT&T v. MCI, 978 F.2d at 736). Thus, the Court concluded that "nondominant carriers are now obligated to file tariffs with the Commission" (Notice at para. 1).

In this proceeding the Commission is looking toward codifying the parameters for such filings. Specifically, the Commission has "set forth a targeted proposal to streamline, to the maximum extent possible consistent with [its] statutory obligations, [its] tariff filing rules for domestic nondominant common carriers" (id. at para. 2). Under the proposed rules, nondominant carriers (1) would be allowed "to file their

¹The Commission's forbearance policies were proposed in a Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) ("Further Notice") and adopted in a Second Report and Order, 91 FCC 2d 59 (1982) (Second Report), recon., 93 FCC 2d 54 (1983) in the Competitive Carrier docket. The Commission instituted its Competitive Carrier proceeding in 1979 to examine and adjust its system of regulation in light of the incipient competition which had begun to emerge in the telecommunications marketplace (Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979)). The proceeding spanned 6 years and in addition to the Notices and Reports mentioned above include the First Report and Order, 85 FCC 2d 1 (1980) (First Report); the Second Further Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed. Reg. 17,308 (1982); the Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); the Third Report and Order, 48 Fed. Reg. 46,791 (1983); the Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); the Fifth Report and Order, 98 FCC 2d 1191 (1984), recon., 59 Rad. Reg. 2d (P&F) 543 (1985); the Sixth Report and Order, 99 FCC 2d 1020 (1985), rev'd MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

interstate tariffs on not less than one day notice"; and, (2) would be required "to file their tariffs and tariff revisions on three and one half inch floppy diskettes" and would be afforded "flexibility in formatting their tariff filings" (id. at para. 13). The Commission would also codify its existing practice of allowing nondominant carriers "to state in their tariffs either a maximum rate or a range of rates" (id.).

Sprint is a nondominant carrier which, despite the Commission's permissive detariffing policy, has continued to provide its services pursuant to tariff. Based on its experience, Sprint agrees that the Commission should formalize its existing practice of relaxed tariff filing requirements for nondominant carriers. Thus, Sprint supports the Commission's

is necessary to provide the Commission with the time to review

the timely filing of non-dominant companies and to work out any

These precedents provided the legal underpinnings for the Commission's adoption of a dominant/pre-dominant carrier

487 F.2d 865, 879 (2nd Cir. 1973)).² Plainly, the Commission's action here comes within such modification authority. While such action codifies a relaxation of the specific information to be included in the tariffs of nondominant carriers,³ it does not in any way eliminate the requirement under Section 203(a) of the Act (47 USC §203(a)) that each carrier file schedules of charges with the Commission.⁴

²This 2nd Circuit holding as to the interpretation of the Commission's power to modify the requirements of Section 203 was cited with approval by the D.C. Circuit in MCI v. FCC (765 F.2d at 1192).

³As the court in MCI v. FCC explained, the term "modify" means, inter alia, to limit or to reduce (765 F.2d at 1192 citing Black's law Dictionary 905 (5th ed. 1979)).

Essentially the Commission is proposing here to codify the existing streamlined tariff requirements applicable to nondominant carriers. And, there is "good cause" for the Commission to apply its modification powers to formally limit the amount of information which a nondominant carrier must include in its schedules filed with the Commission.

As the Commission points out in the Notice, its Competitive Carrier policies, including its permissive detariffing policy, have "played a substantial role in the development of competition in the interexchange market and the increased choices for customers with respect to carriers and prices" (at para. 10). The number of nondominant IXCs operating in the United States grew substantially during the era of permissive detariffing to the point where there are now in excess of 400 such carriers purchasing switched access from local exchange carriers (id.). Given the sheer number of nondominant carriers the imposition of the same tariff content requirements upon nondominant carriers as are required of dominant carriers would be largely unworkable.

(Footnote Continued)

also expressed the need for caution in attempting to use precedents arising under one Act to decide issues arising under the other Act. In General Telephone of the Southwest v. U.S., 449 F.2d 846, 856 (5th Cir. 1971), the Court rejected the argument that because the public convenience and necessity standard under Section 214 of the Communications Act was based upon Section 1(18) of the ICA, it must be interpreted in the same way ("While the similarities between the two sections are unquestionable, it must be emphasized that the functions of the Interstate Commerce Commission, as outlined in the National Transportation Policy...are of an entirely different nature than those of the Federal Communications Commission"). And, in Sea-land Service v. ICC, 738 F.2d 1311, 1318 n. 11 (D.C. Cir. 1984), the Court noted that precedents under the ICA may be useful to issues before the FCC "by way of analogy only."

On the other hand, the continuation of the Commission's existing practice of allowing nondominant carriers to file maximum rates or rate ranges would advance the public interest goals set forth in Competitive Carrier. It would continue a regulatory system under which nondominant carriers would be able to meet the tariffing requirements of Section 203 and still be able to engage in vigorous price competition, to provide for service innovation, to easily enter the market, and to respond quickly to market trends (Notice at para. 12).

Moreover, "it would defy logic and contradict the evidence available" to require that the tariffs of nondominant carriers include the same information as the tariffs of dominant carriers. As Competitive Carrier establishes, the imposition of dominant carrier regulation to nondominant carriers inhibits the development of competition and therefore is totally at odds with the fundamental statutory purpose of the Communications Act "to make available...to all people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communications service with adequate facilities at reasonable charges..." (47 U.S.C. §151) (Further Notice, 84 FCC 2d at 456). Indeed, the application of dominant carrier tariffing requirements to nondominant carriers would advance the interests of AT&T who would be able to use the the detailed information to discipline the market and limit the growth of competition.⁵

⁵AT&T apparently believes that maximum rates or range rates are not sufficient under Section 203 because such tariffs do not
(Footnote Continued)

The tariff content requirements imposed upon dominant carriers are simply not necessary for nondominant carriers. The purpose of tariffs is (1) to enable the Commission to fulfill its statutory obligations to ensure just, reasonable, and not unduly discriminatory rates and (2) to assure customers that they pay no more than the lawful rates (see, e.g., Further Notice, 84 FCC 2d at 478 (tariffing requirement "evolved to protect the consumer from supranormal or discriminatory pricing")). The Commission long ago concluded that it did not need the same type of information from nondominant carriers as is required from dominant carriers in order to fulfill its statutory duties.⁶ This is so because under well-established economic principles, carriers without market power can not successfully charge excessive prices, engage in unlawful discrimination, or otherwise violate Section 201(b) or 202(a) of the Communications Act. Given such conclusion--which has been validated by experience

(Footnote Continued)

provide AT&T with the kind of detailed price and marketing information it covets. AT&T's federal district court lawsuit against Sprint (AT&T v. Sprint, Civil Action No. 93-0285 (HHG) (D.D.C., filed February 10, 1993)) rests upon the notion that the publication of tariffs is intended to benefit other carriers competing with the filing carrier. However, as the Commission made clear in Competitive Carrier, competition is diminished by the public elaboration of rates by nondominant carriers (Further Notice, 84 F.C.C. 2d at 454). Thus, AT&T's view of Section 203 as a means to obtain marketing information from its nondominant competitors is antithetical to competition and contrary to the Commission's overriding statutory mandate as set forth in Competitive Carrier.

⁶As the Commission explains in the Notice (at fn. 41), under a system of maximum or range rates, "[c]ustomers would obtain exact rate information from carriers in the course of obtaining service."

during the nearly 13 years since the adoption of the First Report in Competitive Carrier--a tariff regime applicable to nondominant carriers providing for either maximum rates or range of rates, as as has been allowed by the Commission is sufficient to protect consumers and to enable the Commission to perform its duties under the Act.

That the tariffing regime for nondominant carriers being codified here will not undermine the purpose of tariffs is confirmed by Sprint's own experience. As stated, Sprint's tariffs already set forth maximum rates and allow for discounts from those rates. Specifically, Sprint's tariffs contain a provision which authorizes Sprint to offer volume discounts or promotions from the rates specified in those tariffs to customers who maintain specified levels of service for a given period of time. This provision further states that Sprint will not file the specific terms of the volume discounts or promotions when the value of such discounted service is less than a certain dollar amount or in cases where the benefit of the volume discount or promotion is received by less than a certain number of customers.⁷ Sprint is unaware of any difficulty encountered by

⁷Sprint initially filed this provision on November 5, 1987 in its MTS (Tariff F.C.C. No. 1), WATS (Tariff F.C.C. No. 2) and Virtual Private Network (Tariff F.C.C. No. 5) tariffs. The filing was not challenged by any party and the provision in each of these tariffs became effective on November 19, 1987. Subsequently, Sprint filed the nearly identical provision in its Digital Private Line tariff (Tariff F.C.C. No. 7) in August 1989; in its Video Teleconferencing tariff (Tariff F.C.C. No. 6) in April 1990; and in its Advanced Business Communications Service tariff (Tariff F.C.C. No. 9) in January 1992. Again, these


(Footnote Continued)

the Commission in performing its statutory duties with respect to Sprint's services provided under tariffs during the nearly 5 1/2

carriers" (Notice at para. 25). Specifically, the Commission proposes to make the current requirements as to tariff form "apply only to dominant carriers" (Notice at para. 25). Nondominant carriers would be required to file their complete tariffs on three and one half inch floppy diskettes "formatted in an IBM compatible form using MS DOS 5.0 and Word Perfect 5.1 software" (id. at para. 25(1) and proposed section 61.22 set forth in Appendix A). They would also have flexibility in indicating material that is new or changed (id. at para. 25(2)); would have to file a cover letter "in the form of their choice" instead of a formal transmittal letter (id. at para. 25(3)); and would be allowed to state their tariffs in any form (id. at para. 25(4)).

Plainly, the submission of tariffs on diskettes with the updates integrated into the tariffs will minimize the storage space required and eliminate much of the work involved in keeping the potentially voluminous number of tariffs up-to-date. Thus, Sprint supports these reduced requirements for those nondominant carriers which would find them helpful. Nonetheless, Sprint believes that nondominant carriers should be allowed the alternative of continuing to file their tariffs under the existing format.

Sprint currently maintains eight federal tariffs at the Commission which contain thousands of pages of rates, terms and conditions for hundreds of products and services. It will soon file its ninth tariff setting forth charges for access services



out and clearly indicates the changes being proposed with each transmittal. It believes that this practice is helpful to the Commission's tariff review staff who can review the changed materials without the necessity of culling thousands of pages which integrate changed rates, terms and conditions with the unchanged ones. Thus, for carriers with extensive tariffs already on file at the Commission, the Commission and the public are equally well served by the current rules, and such carriers should be offered the flexibility to continue to file written rates.

As a purely practical matter, it would be extremely burdensome for Sprint to produce its tariffs in Word Perfect 5.1 software. Its thousands of pages are in DisplayWrite 4, and conversion packages are not capable of converting the formatting codes required to produce the tables and page layout currently required by the Commission's rules. Thus, the formatting codes would be lost during a conversion process and would have to be individually re-entered. In addition, Sprint's new access service tariff will contain approximately 1000 pages and the rate tables set forth therein are produced from a spreadsheet. These

Other carriers will be filing tariffs for the first time and thus will be starting "from scratch." The proposed tariff requirements are far more reasonable for these carriers. Presumably, they will be able to use Word Perfect to produce their tariffs and to the extent that such tariffs consist of relatively few service offerings, any changes to the tariffs can be easily and readily identified.

With respect to the proposal to eliminate the formal transmittal letter requirement (Notice at para. 25), Sprint urges the Commission to retain the transmittal letter in the current format for all carriers. The transmittal letter serves a valuable guide to the changed matter. This is true whether there are numerous changes--or just a few--to the tariff. Where carriers file updated tariffs on diskette, a detailed transmittal letter listing all changes will aid the Commission in identifying the changes integrated throughout the tariff. In addition, the production of a transmittal letter outlining the updated matter is not overly burdensome or time-consuming.

(Footnote Continued)

(Notice at n. 12), it would have to continue to file its international tariffs in the current format. Many of Sprint's terms and conditions apply to both its domestic and international services and thus its paper tariffs would not be substantially reduced if it had to file its tariffs for domestic services on floppy diskettes.

IV. THE CURRENT 14-DAY TARIFF NOTICE REQUIREMENTS FOR NONDOMINANT CARRIERS SHOULD BE RETAINED.

The Commission proposes that the notice period for nondominant carriers be reduced from the current fourteen days to only one day. Although Sprint agrees that the Commission has "legal authority to implement this proposal" under Section 203(b)(2) (at para. 17), it believes that the current 14-day notice period for nondominant carriers should be retained. Based on its own experience, Sprint has not found the 14-day notice period to be burdensome or an impediment to its ability to compete in the marketplace.

The Commission tentatively concludes that the current 14-day notice period has an "anticompetitive impact on nondominant carrier competition" because "[t]he advance notice period allows competitors time to begin, and possibly complete, development and implementation of a market response before the tariff becomes effective" (Notice at para. 15). However, as a practical matter, such a competitive response takes time to develop and thus even under a 14-day notice period the nondominant carrier should be able to reap the competitive advantages of its new offering before other carriers are able to respond. At the very least, the initiating carrier will have a few days "headstart" since responding carriers will also be required to submit their tariffs upon 14 days notice.

Moreover, while it is extremely unlikely that the tariff filings of a nondominant carriers will contravene the requirements of Sections 201 and 202 of the Act, there may be exceptions. Indeed, as the Commission itself notes, it has in

the recent past rejected a tariff filing of a nondominant carrier as patently unlawful (Capitol Network Systems, Inc., 6 FCC Rcd 5609 (1991)). Under the one-day notice requirement, the Commission would have found it difficult to prevent this unlawful tariff from becoming effective, especially if the filing were made near the close of the business day.

If, contrary to Sprint's position, the Commission adopts its proposal to reduce the notice period for nondominant carrier tariff filings to one day, it should not also reduce the 14-day notice period for services provided by dominant carriers. Substantial debate remains over the lawfulness of such carriers' tariffs and sufficient public notice is required to review such filings. Pre-effective tariff review of the proposed tariff revisions of dominant carriers often encompasses a broader range of issues than the lawfulness of particular rates. Such review is important to determine whether the tariffs of dominant carriers violate important Commission policies such as its prohibition against resale restrictions, discrimination resulting from particular restrictions (e.g., geographic), and unlawful

rebates. Pre-effectiveness review of the proposed tariff revisions of dominant carriers also often discloses undesirable ambiguities in the tariff language that can easily be corrected before the tariff becomes effective.

Respectfully submitted,
SPRINT COMMUNICATIONS COMPANY L.P.

A large, stylized handwritten signature in black ink, which appears to be "MBF", is written over a horizontal line. The signature is slanted and has a long, sweeping tail that extends to the right.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Comments"